Supreme Court, U. S.
FILED
JUL 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1992

WAYNE C. LA VELLE,

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD, STATE OF CALIFORNIA; TRANS WORLD AIRLINES; LIBERTY MUTUAL INSURANCE COMPANY; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL 1111, DISTRICT 142 OF THE INT'L ASSOCIATION OF MACHINIST; HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondents.

BRIEF IN OPPOSITION TO THE WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION ONE

KENDIG, STOCKWELL & GLEASON
A Professional Corporation

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Attorneys for Respondent,
Liberty Mutual Ins. Company
and Trans World Airlines

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TO THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JURISDICTION

Petitioner has asked for review of a decision of the First Appellate District, Division One of the Court of Appeal, Appellate District State of California. As Petitioner points out on page 4, the case involved therein which was First Civil Number 47704, is the Workers' Compensation Appeals Board Case, 74 LA 391394, which is an injury of May 4, 1974 involving the left hand and arm. The Supreme Court denied hearing on March 20, 1980.

Other cases referred to in the Petitioner's Writ of Certiorare are either still in litigation or are currently on appeal to the Court of Appeal, First Appellate District, state of California, bearing First Civil #49089. As of the date of July 10, 1980, that Appeal has not yet be determined. Respondent respectfully suggests that the United States Supreme Court would only have Jurisdiction over content of First Civil #47704 as all other matters referred to by the Petitioner are currently at other stages of Administrative Appeal.

Respondent respectfully submits however that the United States Supreme Court has no jurisdiction because the federal questions raised at this time were not previously raised in the State Courts.

Petitioner has not complied with Rule 23 (1)(f) by specifying the stage of the state proceedings in which he raised the question he now seeks reviewed.

QUESTIONS PRESENTED. I AND II

Question I and Question II as presented by the Petitioner appear to be the same question: Does the denial of appointment of counsel for a claimed indigent in a workers' compensation proceeding deprive claimant of his rights under the Fourteenth Amendment?

For this Writ to be granted, Petitioner must establish his indigent status.

Petitioner does not establish when, where or how he claimed to be an indigent.

Petitioner never asserted he was indigent

at any stage of the trial or appellate proceedings related to his injury of May 4, 1974.

The Petitioner analogizes his right to counsel in Workers' Compensation Cases with cases involving personal liberty and property rights. Personal liberty is not at stake in workers' compensation proceedings as it is in criminal matters, and, no property is taken from the injured worker at any workers' compensation proceeding. Petitioner analogizes the mental status of an injured worker making a claim to the mental status of one who has been arrested and imprisoned. The analogy is not factually relevant.

In California, the fact of an injured worker's economics status is not determinative of the fact of attorney representation. Fees for attorneys representing the injured worker in California Workers' Compensation Actions are determined by the Trial Judge.

Attorney fees are Awarded only when there is an Award of Compensation Benefits. Although the wording of Labor Code Sec. 4903(A) is permissive, the Appeals Board has no discretion to disallow a lien for attorney's fees where it is established that the attorney did furnish services of value. Therefore, for rich or poor, there is attorney representation available for free until such time as the attorney performs valuable services, and, then a fee is awarded against benefits received. The fee is a percentage of the recovery from nine(9) to twelve (12) per cent depending on the complexity of the case.

Labor Code Sec. 4903(A) authorizes the Appeals Board to determine and allow as a lien a reasonable attorney's fees for services rendered together with reasonable disbursements in connection with the litigation.

Thus, whereas attorney Emmet Matthews filed a lien for services in the sum of $4,000.00, the Judge only awarded the attorney $250.00 in the

Findings and Award of April 25, 1979, in case number 71 LA 371-256.

As to the question of inexperience, the applicant was free to choose the method of his representation, and, the record does not reveal his request to have an attorney appointed on his behalf. It should seem clear from the number of Awards contained in Petitioner's appendex to this Petition for Writ, that the Petitioner has processed his claims to a degree that he has received compensation of varying specie on the majority of his claims. The Petitioner asserts that there are few attorneys who represent the injured worker. There are hundreds of attorneys qualified to do so either by their general experience or by the fact that they have been certified by the State of California as Workers' Compensation Specialists. There is an association of applicant's attorneys, California Applicant's Attorney's Association, and the Los Angeles County Bar has a lawyer referral service.

It is not be lack of appointment, but rather, by choice, that the applicant had no attorney. He admits himself, that he was represented by two different attorneys at various times during the proceedings.

The Petitioner admits that he rejected the assistance of counsel twice. The Petitioner claims that without the assistance of counsel that he cannot determine the lawfullness of his claim or the validity of Motions. Assistance of counsel for the injured worker is not required for this. Such determinations are within the province of a Trial Judge. Petitioner claims that an individual who is not trained cannot possibly know or pursue the technical, elaborate and sophisticated measures necessary to assemble and appraise the facts and the law in connection with his case. Yet, the Wrokers' Compensation Act is drawn in such a way that it is not a technical and elaborate procedure.

"No informality in any proceeding nor

> in the manner of taking any testimony shall invalidate any Order, Decision, or Award or Rule made and filed as specified in this Provision. No Order, Decision, Award or Rule shall be invalidated because of the admission into the record and used as proof of any fact in dispute, of any evidence not admissible under the Common Law or Statutory Rules of Evidence and Procedure. It is not required to know Rules of Evidence. There are no texhnicalities involved. The Proceedings are informal and there are no strict Rules of Procedure to follow under California Labor Code, Sec. 5709."

Petitioner would claim that he has been left at sea by not having counsel, yet, he does admit that the Judge acted as a liason between multiple defense counsel and the applicant (page 19) and admits that the Judge was a "sound Judge" (page 21). On page 21 of his Writ, the Petitioner attempts to show the difficulty of the aspects of the Trial by quoting language made by counsel for Hartford Accident & Indemnity in its Petition for reconsideration. The case in which that statement was made is 76 ING 38740, a case this respondent respectfully suggests that this Court does not have jurisdiction over at this time.

And, a case not involving this respondent, Liberty Mutual Insurance Company.

On page 16 of his Writ, Petitioner states that the Judge allowed his attorney to be released, over Petitioner's protest. However, it is true with respect to one case only. The Petitioner at the time had no legal representation on his other cases, and, asked for none.

Counsel was relieved in 76 LA 403-651. Joseph Miller was the attorney relieved. Joseph Miller represented the applicant in 76 LA 403651 only, That case involved Hartford Accident and Indemnity Company. It did not involve Liberty Mutual Insurance Company as the carrier for Trans World Airlines. It did not involve International Association of Machinists and Aerospace Workers Local 1111. It did not involve District 142 of the International Association of Machinists.

Petitioner claims that the well-known adage that "he, that is his own lawyer has a fool for

a client" has a psychiatric basis. There is no foundation for this statement. Such a statement is nothing more than wit. For the Petitioner's arguments to have any merit, he must have to establish not only his indigent status and his incompetency, but, also show that such factors resulted in a Trial that was not fair. He makes no attempt to show that he has not received a fair Trial, and, on page 9, paragraph 3 of his Writ, even admits that the Judge was trying to help him.

QUESTION PRESENTED III

Has Petitioner been denied a fair trial by failure of the Trial Judge to invoke the provisions of California Labor Code 5408 and appoint a guardian for Petitioner who now claims he was incompetent..

Petitioner never claimed incompetency at any stage of the trial, and, the record is devoid of any medical reports asserting that the Petitioner was incompetent, or, either unable to

manage his own affairs, or, unable to prosecute his litigation. The Petitioner brings forth no medical opinion in his Writ to augment his allegation either.

Does Petitioner claim that he is still incompetent? If so, then we must note that his Writ herein demonstrates clear intellectual functioning.

If Petitioner only asserts that he was incompetent at the time of his trial, then he should now be able to set forth facts establishing the incompetency, as well as speak to the question of how he was able to testify fully concerning his various accidents and subsequent medical treatment.

The Petitioner asserts that the Appeals Board Judge had knowledge and observation of the Petitioner's psychological condition and yet failed to protect the Petitioner. The Petitioner does not set out any form of conduct which should have given rise to some suspicion

of incompetency on the part of the Trial Judge. It is a well known fact that the Workers' Compensation Laws of this State do tend to protect the employee. Neither Stipulations nor Settlements are accepted unless they meet a minimum standard of adequacy. It is entirely inconceivable that the Trial Judge, Jesse Fluhart, would allow the Petitioner to maintain his case over several Hearings if he did feel that he was incompetent. Judge Fluharty is a former Presiding Judge of the Los Angeles Workers' Compensation Appeals Board, and is presently the presiding Judge of the Central South Division in Los Angeles. Any Judge, let alone a Judge of Fluharty's background and experience would not allow an incompetent to proceed before him. The Petitioner has done nothing to establish that there was an element of incompetency to which the Judge should address himself.

There is no proof such incompetency, such

proof being a prerequisite to assert the argument that the Workers' Compensation Judge failed to invoke the Provisions of Labor Code Sec. 5408 and denied due process. He has never submitted any documentation regarding past or present incompetency during any stages of the Trial, or, the subsequent stages of Appeal. He is attempting to inflame the record by this bald insertion, which is contradicted by the fact that there were various reports filed containing observations as to psychiatric problems but none as to incompetency. The Petitioner attempts to contrast his mental state with incompetence. However, he has never claimed that he has suffered mental injury resulting in incompetency or organic brain damage. Rather, he has claimed only a degree of psychoneurosis in his other case 74 LA 392-377, currently on Appeal to the Court of Appeal, First Appellate District, State of California.

In 74 LA 392-377, the Petitioner was

awarded psychiatric disability of 13 1/2 per cent out of possible 100 per cent disability. Obviously, a relatively mild psychoneurosis has been determined.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM HERBERT ANDERSON, Esq.
8671 Wilshire Blvd., 7th Floor
Beverly Hills, CA 90211

STATUTES INVOLVED

Liens against amount to be paid as compensation Sec. 4903.

The appeals board may determine, and allow as liens against any sum to be paid as compensation, any amount determined as hereinafter set forth in subdivisions (a) through (g) of this section. If more than one such lien be allowed, the appeals board may determine the priorities, if any, between the liens allowed. The liens which may be allowed hereunder are as follows: (a) A reasonable attorney's fee for legal services pertaining to any claim for compensation either before the appeals board or before any of the appellate courts, and the reasonable disbursement in connection therewith...

Enacted 1937; Amended Stats 1945 ch507 Sec 1; Stats 1947 ch 833 Sec 1; Stats 1949 ch 488 Sec 1; Stats 1957 ch 1977 Sec 1; Stats 1963 ch 1556 Sec 1; Stats 1965 ch 1513 Sec 103, operative January 15, 1966; Stats 1967 ch 1721 Sec 2.

INFORMALITIES AND INADMISSIBLE EVIDENCE Sec. 5709

No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this decision. No order, decision, award, or rule shall be invalidated because of the admission into record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.

Enacted 1937; Amended Stats ch 1431 Sec 75; Stats 1951 ch 779 Sec 9.

MINORS AND INCOMPETENTS Sec 5408

If an injured employee or, in the case of death, any of his dependents, is under 18 years of age or incompetent at any time when any right or privilege accrues to such employee or dependent under this division, a general guardian, appointed by the Court, or a guardian ad litem or trustee appointed by the appeals board may,

on behalf of the employee or dependent, claim and exervise any right or privilege with the same force and effect as if no disability existed.

No limitation of time provided by this division shall run against any person under 18 years of age or any incompetent unless and until a guardian or trustee is appointed. The appeals board may determine the fact of the minority or incompetency of any injured employee and may appoint a trustee to receive and disburse compensation payments for the benefit of such minor or incompetent and his family.

Enacted 1937; Amended Stats 1965 ch 1513 Sec 138, operative January 15, 1966; Stats 1971 ch 822 Sec 1, ch 1748 Sec 49.

APPENDIX I

WORKERS' COMPENSATION APPEALS BOARD
State of California

WAYNE C. LA VELLE SS# 363 46 2338 Applicant v TRANS WORLD AIRLINES; LIBERTY MUTUAL INSURANCE COMPANY Defendants	Case No. 71 LA 371 256 FINDINGS AND AWARD

Wayne C. LaVelle, Applicant
(in propia persona)
Kendig, Stockwell & Gleason
by Steven Harris
Attorneys for Liberty Mutual
Insurance Company

****

Application having been filed herein, all parties having appeared, and the matter having been regularly submitted the Honorable JESSE E FLUHARTY, Workers' Compensation Judge, now find, awards, and orders as follows:

FINDING OF FACT

1. Applicant, Wayne C. LaVelle, born February 15, 1946, was employed as a ramp serviceman, air transportation industry, at Los Angles, California, on August 4, 1970, by Trans World Airlines, whose carrier on said date was Liberty

Mutual Insurance Company, when he sustained an injury arising out of and occurring in the course of his employment to his right knee.

2. Applicant's earnings were maximum for both temporary and permanent disability.

3. Applicant has been fully compensated for temporary disability for broken periods through August 1, 1973.

4. Applicant became permanent and stationary August 31, 1972.

5. Employment Development Department paid unemployment eompensation disability benefits for period beginning April 21, 1973 to July 29, 1973, at $105.00 per week concurrently with the period in which temporary disability payments were paid by defendants, however, there are no funds upon which to impress a lien.

6. This injury caused permanent disability of 8-1/4 per cent after apportionment, amounting to 33 weeks of disability payments at the rate of $52.50 a week in the total sum of $1,732.50 payable forthwith.

7. Medical treatment is required to cure or relieve from the effects of this

injury after notice of need made upon defendant.

8. Transamerica Credit Corporation advanced living expenses to the applicant subsequent to the injury of the reasonable value of $246.54.

9. Andre LaVelle advance living expenses to the applicant subsequent to the injury of the reasonable value of $660.00.

10. Applicant is entitled to self procured medical treatment expenses incurred payable as follows: $1,333.000 to Dr. R. Hunt, $50.00 to McGraw Medical Corporation, $431.00 to Glendale Memorial Hospital, $71.50 to Dr. R. Call, $967.80 to South Bay Hospital and $200.00 to Applicant.

11. Applicant reasonably incurred expense for medical reports to prove a contested case of the reasonable value of $150.00 payable to Dr. L Yamshon, $135.00 payable to Dr. R. Roback, and $200.00 payable to Mental Health Institute.

12. The reasonable value of the services of applicant's former attorney, Ermett C. Mathews, is $250.00.

13. Defendants did not unreasonably delay payment of benefits.

AWARD

AWARD IS MADE in favor of WAYNE C. LA VELLE against LIBERTY MUTUAL INSURANCE COMPANY of permanent disability indemnity in accordance with Finding 6 hereinabove; together with medical treatment in accordance with Finding 7 hereinabove; together with expenses for self procured medical treatment in accordance with Finding 10 hereinabove; together with medical legal costs in accordance with Finding 11 hereinabove; less $250.00 to Ermet C. Mathews in satisfaction of lien for attorney's fee herein allowed.

IT IS ORDERED that the lien claim of Employment Development be and it is hereby disallowed.

JESSE E FLUHARTY
WORKERS COMPENSATION
JUDGE

EXECUTED:
APR 25 1979
Served on said date by mail on persons shown on official address record
by: _____

APPENDIX II

WORKERS COMPENSATION APPEALS BOARD
State of California

WAYNE LA VELLE SS#363 46 2338 Applicant v TRANS WORLD AIRLINES LIBERTY MUTUAL INSURANCE COMPANY Defendant	Case no. 74 LA 391 394 FINDINGS AND AWARD

Wayne C. La Velle, Applicant
(in propria persona)

Kendig, Stockwell & Gleason
by Steven Harris
Attorneys for Liberty Mutual
Insurance Company

****

Application having been filed herein, all parties having appeared, and the matter having been regularly submitted, the Honorable JESSE E FLUHARTY, Workers' Compensation Judge, now finds , orders, and awards as follows:

FINDINGS OF FACT

1. Applicant, Wayne C. LaVelle, born January 15, 1946, was employed as a ramp serviceman, air transport industry, at Los Angeles, California, on May 4, 1974, by Trans World Airlines, whose insurance carrier on said date was Liberty Mutual

Insurance Company, when he sustained an injury arising out of and occurring in the course of his employment to his left hand and arm.

2. Applicant's earnings were maximum for both temporary and permanent disability ($119.00-$70.00).

3. This injury caused further temporary disability beginning July 24, 1974, to and including July 26, 1974, for which indemnity is payable in the total sum of $51.00.

4. This injury caused no permanent disability.

AWARD

AWARD IS MADE in favor of WAYNE C. LA VELLE against LIBERTY MUTUAL INSURANCE COMPANY of temporary disability indemnity in the saum of $51.00 payable forthwith.

JESSE E FLUHARTY

EXECUTED: MAY 25 1979

Dated and Filed at Los Angeles, CA
Served by mail on person as shown on offical address record MAY 25 1979

APPENDIX III

COURT OF APPEAL OF THE STATE
OF CALIFORNIA

in and for

FIRST APPELLATE DISTRICT

DIVISION ONE

WAYNE C. LA VELLE Petitioner v WORKERS COMPENSATION APPEALS BOARD, ET AL. Respondents	1 Civ. No. 47704 ORDER DENYING WRIT OF REVIEW

BY THE COURT:

The petition for writ of review is denied.

RACANELLI, P.J.

Dated FEB 22 1980

CALIFORNIA SUPREME COURT
ORDER DENYING HEARING

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

MAR 20 1980

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 47704

Lavelle

vs.

W.C.A.B. et al.

Respectfully,

G. E. BISHEL
Clerk

68993-877 11-78 4M OBP

APPENDIX IV

FINDINGS OF FACT

1. Applicant, Wayne C. LaVelle, born January 15, 1946, was employed as a ramp serviceman in the aircraft industry in Los Angeles, California, during the period August 4, 1972 to an including October 25, 1974, by Trans World Airlines, whose workers' compensation insurance carrier during the above period was Liberty Mutual Insurance Company, when he sustained injury arising out of and occurring in the course of his employment resulting in emotional and mental illness.

2. Applicant was also employed as a shop steward during the period June 1, 1971 to and including December 31, 1972, by Local Lodge 1111 of the International Association of Machinists and Aerospace Workers, which was uninsured for workers' compensation purposes during the above-mentioned period, and sustained injury as indicated in Finding of Fact 1 hereinabove.

3. Applicant was also employed as a shop steward during the period June 1, 1971 to December 31, 1972 by District 142 of the International Association of Machinists and Aerospace Workers', which

was uninsured for workers compensation purposes during the abovementioned period, and sustained injury as indicated in Finding of Fact 1 hereinabove.

4. Applicant's earnings were maximum for both temporary and permanent disability ($105.00 - $70.00).

5. This cause of action is not barred by the Statute of Limitations.

6. Medical treatment is required to cure or relieve from the effects of this injury. Liberty Mutual Insurance is designated to furnish and control medical treatment, subject to reimbursment by Local Lodge 1111 of the International Association of Machininsts and Aerospace Workers, to be adjusted by the parties.

7. This injury caused temporary disability beginning January 22, 1974 to and including February 28, 1974, for which endemnity is payable at the rate of $105.00 per week.

8. Employment Development Department paid unemployment compensation disability benefits and is allowed a lien for payments at the rate of

$105.00 per week, beginning January 30, 1974 to February 28, 1974, in the total sum of $450.00, for which period temporary disability was found herein.

9. This injury caused permanent disability after apportionment of 13-3/4 per cent, amounting the 45.25 weeks of disability payments at the rate of $70.00 a week in the total sum of $3,167.00, payable forthwith.

10. Liability of each defendant herein, Liberty Mutual Insurance Company, Local Lodge 1111 of the International Association of Machinists and Aerospace Workers, and Distict 142 of the International Association of Machinists and Aerospace Workers, is found to be joint and several.

11. Liberty Mutual is appointed managing carrier, subject to contribution to be worked out in separate proceedings.

12. Applicant is entitled to reimbursment for expenses of self-procured medical tratment required to cure or relieve from the effects of this injury in amounts to be adjusted by the parties, including but not limited to the sum of

$855.00 payable to Leonard Neff, M.D., and $1,375.00 payable to Valley Psychiatric Medical Clinic/Dr. Eisenberg, subject to reimbursment only for services provided to applicant during the period of injury herein.

13. The lien claim of Lien Services, Inc. for Connecticut General Life Insurance Company in the sum of $3,686.70 is for payments to doctors and hospitals for services to the applicant on dates prior to the period of injury herein and/or other parts of body injured and is hereby disallowed.

14. Applicant is entitled to reimbursement for medical-legal expenses in amounts to be adjusted by the parties including but not limited to $225.00 payable to Bruce Medical Group, $300.00 to valley Psychiatric Medical Clinic/ Dr. Eisenberg, and $150.00 to Law Offices of William C. Gordon in reimbursement for payment to Martin Blinder, M.D.

15. A penalty will not be imposed.

16. Applicant's former attorney, Hermet Mathews has been awarded a fee in Case 71 LA 371 256.

17. Applicant's former attorney, Law Offices of William C. Gordon, 66 Montgomery Street, Suite 600, San Francisco, Ca, 94104, has rendered services of the reasonable value of $350.00.

AWARD

AWARD IS MADE in favor of WAYNE C. LAVELLE against LIBERTY MUTUAL INSURANCE COMPANY, LOCAL LODGE LLLL OF THE INTERNATIONAL ASSOCIATION OF MACHININSTS AND AEROSPACE WORKERS, jointly and severally with LIBERTY MUTUAL INSURANCE COMPANY as managing carrier in accordance with Finding 11 hereinabove; of temporary disability indemnity in accordance with Finding 7 hereinabove; together with permanent disability indemnity in accordance with Finding 9 hereinabove; together with medical treatment in accordance with Finding 6 hereinabove; together with reimbursement for self procurred medical treatment expenses in accordance with Finding 12 hereinabove; together with medical-legal costs in accordance with Finding 14 hereinabove; less $450.00 payable to Employment Development Department in satisfaction of its lien claim; less $350.00 to Law

offices of William C. Gordon, as attorney fee herein allowed.

IT IS FURTHER ORDERED that the lien claim of Lien Services Inc. for Conneticut General Life Insurance Company be and the same is hereby disallowed.

IT IS FURTHER ORDERED that STATE COMPENSATION INSURANCE FUND be and it is hereby dismissed as party defendant herein.

_____
JESSE E. FLUHARTY
WORKERS COMPENSATION
JUDGE

EXECUTED: February 25, 1980
Served on said date by mail on persons on official address record
by:_____

WAYNE C. LAVELLE
Case No. 74 LA 392 377